

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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J.P., a minor, by and through
CHANNY SOK-HANG as guardian,

No. 2:21-cv-00788 WBS AC

Plaintiff,

v.

CITY OF STOCKTON, STOCKTON
POLICE DEPARTMENT, ERIC JONES,
JORGE ANDRADE, BRADLEY MILLER
and DOE 1 to 10,

MEMORANDUM & ORDER RE:
DEFENDANTS' MOTIONS TO
DISMISS AND TO STRIKE
PORTIONS OF PLAINTIFF'S THIRD
AMENDED COMPLAINT AND
PLAINTIFF'S MOTION TO
SUBSTITUTE

Defendants.

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Plaintiff J.P., the minor son of the late Saoun Pol, in his individual capacity, and as the real party in interest and the successor-in-interest of Pol, brought this action against defendants arising from the officer-involved shooting and death of Pol. (Third Amend. Compl. "TAC" (Docket No. 31).) Before the court are defendants' motion to dismiss (Docket No. 32) and motion to strike (Docket No. 33), and plaintiff's motion to substitute (Docket No. 39).

1 I. Factual and Procedural Background

2 The factual background of this case is described in
3 detail in the court's November 30, 2021 Order (Docket No. 25)
4 granting in part and denying in part defendants' motion to
5 dismiss plaintiff's First Amended Complaint (Docket No. 16). In
6 short, plaintiff alleges that on May 4, 2019 defendants Stockton
7 Police Department Officers Jorge Andrade and Bradley Miller
8 responded to 911 reports of a man, later determined to be Pol,
9 "acting erratically." (TAC 3-4, ¶¶ 17-22.)¹ Upon arrival at the
10 scene, after giving brief instructions to Pol, Andrade fired
11 gunshots at Pol, resulting in his death. (Id. ¶¶ 22-23.)

12 After the court's November 30, 2021 order on
13 defendants' motion to dismiss, plaintiff filed a Second Amended
14 Complaint (Docket No. 28), after which the parties stipulated to
15 plaintiff filing the TAC. (Docket Nos. 29, 30.) In his TAC,
16 plaintiff, in relevant part, has (1) added a claim for liability
17 under City of Canton v. Harris, 489 U.S. 378 (1989), against the
18 City of Stockton ("the City") and the Stockton Police Department
19 ("the Police Department"); (2) again brought a claim under the
20 Tom Bane Act, though only against Andrade; and (3) again brought
21 a negligence claim, though only against Andrade and Miller.

22 II. Motion to Dismiss and Motion to Strike Claims

23 Defendants move to dismiss (1) plaintiff's claim for
24 Canton liability; (2) plaintiff's Tom Bane Act claim; and (3)
25 plaintiff's negligence claim, or in the alternate, plaintiff's

26 ¹ The numbering of paragraphs in the TAC begins anew for
27 each claim for relief and in the prayer for relief. To avoid
28 confusion, citations to the TAC will include page numbers and
paragraph citations.

1 negligence claim against Miller. Defendants also move to strike
2 the same claims.

3 A. Canton Liability

4 When the court gave plaintiff leave to amend his
5 complaint in its previous order, the court stated that leave was
6 granted "if he can do so consistent with this Order." (Order on
7 Mot. to Dismiss at 12.) The court did not give plaintiff leave
8 to amend in order to add a new claim not previously asserted, nor
9 did plaintiff request such leave to amend. For this reason,
10 plaintiff's claim for Canton liability will be stricken. See
11 Gerritsen v. Warner Bros. Ent., Inc., 116 F. Supp. 3d 1104, 1125
12 (C.D. Cal. June 12, 2015) (striking newly pled claims because
13 they exceeded the scope of leave to amend granted by the court);
14 DeLeon v. Wells Fargo Bank, N.A., No. 10-cv-01390-LHK, 2010 WL
15 4285006, at *3 (N.D. Cal. Oct. 22, 2010) ("[W]here leave to amend
16 is given to cure deficiencies in certain specific claims, courts
17 have agreed that new claims alleged for the first time in the
18 amended pleading should be dismissed or stricken.").

19 B. Tom Bane Act & Negligence

20 In its previous order, the court dismissed plaintiff's
21 Tom Bane Act and negligence claims because (1) defendants argued
22 they were barred due to plaintiff's failure to timely present a
23 claim pursuant to the California's Government Claims Act,
24 California Government Code § 911.2, and (2) plaintiff did not
25 oppose dismissal. However, plaintiff has re-alleged these claims
26 solely against Andrade and Miller in the TAC.

27 Even against these individual officers, the claims are
28 barred. If a claim against an entity is barred due to failure to

1 comply with the claim presentation requirements of the California
2 Government Claims Act, the claim is also barred against a "public
3 employee or former public employee for injury resulting from an
4 act or omission in the scope of his employment as a public
5 employee." See Cal. Gov't Code § 950.2.

6 Plaintiff does not dispute that his claim was untimely
7 but argues that defendants have not "stipulated that both
8 officers' actions were wholly under color of law" and believes it
9 is "probable" that the City and the Police Department would argue
10 the officers were not acting under color of law. (Pl.'s Opp'n at
11 4-5.) Plaintiff argues that for this reason his allegations
12 under the Tom Bane Act in the TAC state that Andrade is liable
13 "whether or not acting under color of law." (TAC 26, ¶¶ 4-6)

14 However, the concept of "under color of law" is
15 different from "scope of employment." See Smithen v. United
16 States, No. CV 09-00414-GW, 2017 WL 11628588, *8, n. 2 (C.D. Cal.
17 July 28, 2017). Therefore, plaintiff's allegations regarding
18 "color of law" do not defeat the time barred nature of the state
19 law claims. Notably, plaintiff's TAC states that Andrade and
20 Miller were "at all times material herein, . . . law enforcement
21 officer[s] employed by the City [] and [] Police Department,
22 acting within the scope of that employment." (TAC 2-3, ¶¶ 9-10
23 (emphasis added).)

24 Accordingly, the court will dismiss plaintiff's Tom
25 Bane Act and negligence claims because the claims are barred due
26 to failure to timely present a claim pursuant to the California
27 Government Claims Act.

28 III. Motion to Strike Prayer for Relief

1 Defendants move to strike paragraph 4 of plaintiff's
2 TAC, which seeks an injunction against all defendants. (TAC 28,
3 ¶ 4.) First, defendants argue, and plaintiff does not dispute,
4 the requested injunctive relief cannot be permitted against Eric
5 Jones as he retired and is no longer the Stockton Chief of
6 Police.² (See Defs.' Mot. to Dismiss at 9; Pl.'s Opp'n at 5.)³
7 To the extent the injunction is requested against Eric Jones, it
8 is stricken.

9 Next, defendants argue that paragraph 4(a) requests an
10 injunction against "defendants and their sheriff's deputies," but
11 the TAC does not name any sheriff's department or deputies as
12 parties. Plaintiff provides no argument in opposition to this
13 portion of the motion. No sheriff's department or sheriff's
14 deputies are involved in this suit, and therefore, the court will
15 grant defendants' motion to strike the language in paragraph 4(a)
16 regarding sheriff's deputies.

17 Finally, defendants argue the requested injunction is
18 improper as to Andrade and Miller as they are "rank and file
19 officers who have no ability to institute or enforce any
20 policies." (Defs.' Mot. to Strike at 10.) Plaintiff provides no
21 argument in his opposition to this portion of the motion to
22 strike. (See Pl.'s Opp'n at 5.) When asked at oral argument if
23

24 ² Alongside their motions, defendants submitted a request
25 for judicial notice of a news article from a local media outlet
26 announcing Eric Jones' retirement. (Docket No. 34). Plaintiff
does not oppose this request (Pl.'s Mot. at 2), and therefore,
the request is GRANTED.

27 ³ Plaintiff's motion to substitute relates to this issue
28 and is discussed below.

1 and how plaintiff has standing to seek injunctive relief against
2 these officers, plaintiff's counsel could provide no intelligible
3 response. This lawsuit is brought only by the minor son of the
4 decedent. There are no allegations that these defendants pose a
5 particular threat to the constitutional rights of this plaintiff
6 which needs to be enjoined. See City of Los Angeles v. Lyons,
7 461 U.S. 95, 106 (1983) (holding that plaintiff must show "a real
8 and immediate threat" of facing the same conduct he had
9 previously experienced by police officers to have standing for
10 injunctive relief). Therefore, defendants' motion to strike the
11 references to Andrade and Miller from paragraph 4 is granted.

12 IV. Plaintiff's Motion to Substitute

13 Given Eric Jones' retirement as Stockton Chief of
14 Police, plaintiff moves to substitute the Interim Stockton Chief
15 of Police in his new official capacity for "Eric Jones in his
16 official capacity." (Pl.'s Mot. at 1.) The parties agreed at
17 oral argument that Stanley McFadden has now been appointed as the
18 new Stockton Chief of Police, so there is no longer an interim
19 Chief of Police.

20 Plaintiff relies on Federal Rule of Civil Procedure
21 25(d), which allows an officer's successor to be substituted when
22 the original "public officer who is a party in an official
23 capacity . . . ceases to hold office while the action is
24 pending." Fed. R. Civ. P. 25(d) (emphasis added). Defendants
25 correctly argue that Rule 25(d) only allows for substitution when
26 the public officer is sued in his official capacity. Plaintiff
27 states in his motion to substitute that Jones is named "in both
28 his official and individual capacity," but the TAC does not

1 explicitly state as such. (See TAC 2, ¶ 8.)

2 However, the "basis of the claims asserted and the
3 nature of the relief sought make clear" that the action is also
4 brought against Jones in his official capacity. See Cent. Rsrv.
5 Life of North Am. Ins. Co. v. Struve, 852 F.2d 1158, 1161 (9th
6 Cir. 1988) (relying on the basis of the claims and nature of the
7 relief sought, rather than the caption of the complaint, in
8 determining if the state was the real party in interest); Price
9 v. Alaska, 928 F. 2d 824, 828 (9th Cir. 1990) (relying on the
10 basis of the claims asserted and the nature of the relief sought,
11 specifically damages, the court held that the defendants were
12 being sued in their individual capacity). Here, plaintiff
13 alleges that Jones was the final policymaking authority for the
14 Police Department and plaintiff is seeking injunctive relief
15 against Jones to implement certain policies in the Police
16 Department, which he can only do in his official capacity. (TAC
17 6, ¶ 36; 28, ¶ 4.) The basis of plaintiff's claims and the
18 injunctive relief sought indicate that Jones is also sued in his
19 official capacity.

20 Therefore, plaintiff's motion to substitute will be
21 granted and Stanley McFadden will be substituted in place of Eric
22 Jones.

23 IT IS THEREFORE ORDERED that:

24 1. Defendants' motion to dismiss (Docket No. 32)
25 plaintiff's Tom Bane Act and negligence claims be, and the same
26 hereby, is GRANTED.

27 2. Defendants' motion to strike (Docket No. 33)
28 plaintiff's Canton liability claim, and prayer for relief to the

1 extent it names Eric Jones, "sheriff's deputies," and Andrade and
2 Miller be, and the same hereby, is GRANTED.

3 3. Plaintiff's motion to substitute (Docket No. 39)
4 Eric Jones with the new Stockton Chief of Police Stanley McFadden
5 be, and the same hereby, is GRANTED.

6 Plaintiff has twenty days from the date of this Order
7 to file a fourth amended complaint, if he can do so consistent
8 with this Order.⁴ Plaintiff is not given leave to allege
9 additional claims or re-allege the claims for Canton liability,
10 the Tom Bane Act, and negligence dismissed or stricken above
11 against any defendants.

12 Defendants have thirty days, from the end of
13 plaintiff's twenty-day deadline to file an amended complaint, to
14 respond to the operative complaint at that time.

15 Dated: May 4, 2022


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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28 ⁴ Any amended complaint should not restart numbering for
paragraphs for each claim.